



November 19, 1999

Mr. Tony Resendez  
Escamilla & Poneck, Inc.  
1200 South Texas Building  
603 Navarro Street  
San Antonio, Texas 78205-1826

OR99-3326

Dear Mr. Resendez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 128992.

The Harlandale Independent School District (the "district"), which you represent, received a request for several categories of information concerning the district's chief of police, including "[a]ll completed investigations or reports of investigations made by or for [the district] regarding the job performance or conduct of" the police chief. You contend that the requested investigations and reports are excepted from public disclosure by sections 552.101, 552.102, 552.103, 552.107, and 552.111 of the Government Code. We assume that you have released the remainder of the requested information. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You inform this office that a fellow police officer has filed a complaint with the Equal Employment Opportunity Commission (“EEOC”) alleging sexual harassment and discrimination. This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). You inform us that the EEOC investigation is still ongoing. Based on your arguments and the information before us, we conclude that you have shown that litigation is reasonably anticipated. Furthermore, we find that the requested information relates to the anticipated litigation. Thus, you may withhold most of the requested information pursuant to section 552.103(a). Except for the information discussed below, you may withhold the requested information.<sup>1</sup>

The applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). In addition, we note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information and such information must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). The opposing party has had access to the submitted EEOC Notice of Charge of Discrimination; therefore, you may not withhold this document under section 552.103. Similarly, the October 22, 1998 letter from the complainant’s attorney may not be withheld under section 552.103. However, the Notice of Charge of Discrimination and the October 22, 1998 letter contain information excepted from public disclosure by common-law privacy as encompassed by section 552.101 of the Government Code.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Information may be withheld from the public under common-law privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open

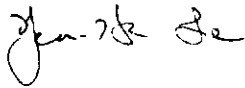
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<sup>1</sup> We caution that some of the information may be confidential by law or may implicate the proprietary interest of a third party. Therefore, if the district receives a request in the future, at a time when litigation is no longer reasonably anticipated or pending, the district should seek a ruling from this office on the other exceptions raised before releasing any of the requested information. See Gov’t Code § 552.352 (distribution of confidential information may constitute criminal offense).

Records Decision No. 611 at 1 (1992). A sexual harassment victim's identifying information is protected under common-law privacy. *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). We have marked the information in the Notice of Charge of Discrimination and the October 22, 1998 letter that you must withhold. The remaining information in these two documents must be released.<sup>2</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/ljp

Ref.: ID# 128992

Encl. Marked documents

cc: Ms. Cecilia Balli  
San Antonio Express-News  
P.O. Box 2171  
San Antonio, Texas 78297  
(w/o enclosures)

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<sup>2</sup>These two documents to which the opposing party has had access will not be excepted from disclosure under either section 552.107 or 552.111. Such records are not confidential client communications or information excepted under the attorney-client privilege of section 552.107. Moreover, such records are not privileged work product information or interagency or intraagency memoranda excepted from disclosure under section 552.111.